APPENDIX A — DECISION OF THE COURT OF APPEALS OF OHIO, FOR THE TENTH APPELLATE DISTRICT FILED APRIL 15, 2008

THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

No. 06AP-644
(C.P.C. No. 02CR09-5493)

(REGULAR CALENDAR)

State of Ohio,

Plaintiff-Appellee,

v.

David E. Wade,

Defendant-Appellant.

DECISION

Rendered on April 15, 2008

ON APPLICATION FOR RECONSIDERATION

KLATT, J.

Plaintiff-appellee, the State of Ohio, has filed an application for reconsideration, pursuant to App.R. 26(A), requesting that the court reconsider our decision

rendered on February 12, 2008. Defendant-appellant, David E. Wade, filed a memorandum in opposition. For the following reasons, we grant the State's application.

When presented with an application for reconsideration, an appellate court must determine whether the application calls to the court's attention an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. *State v. Rowe* (Feb. 10, 1994), Franklin App. No. 93AP-1763; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 69. "An application for reconsideration may not be filed simply on the basis that a party disagrees with the logic used by the appellate court or the conclusions it reached." *Juhasz v. Costanzo* (Feb. 7, 2002), Mahoning App. No. 99-CA-294. "App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *State v. Owens* (1996), 112 Ohio App.3d 334, 336.

In this case, appellant appealed a judgment entry of conviction entered by the Franklin County Court of Common Pleas. A jury convicted him of rape, kidnapping, aggravated burglary, robbery, theft, receiving stolen property, failure to comply with an order of a police officer, and possession of cocaine. In our February 12, 2008 opinion, we determined that the trial court erred by not instructing the jury that it could not consider testimony that appellant had a gun during the

commission of the offenses in determining whether he used force while committing the rape offense. *State v. Wade*, Franklin App. No. 06AP-644, 2008-Ohio-543. We noted that the evidence of force was "minimal" and there was a "substantial likelihood" that the jury considered appellant's alleged use of a gun to determine the element of force. *Id.* at fn. 7. Accordingly, we reversed the matter and remanded it for further proceedings.

The State now contends that this court committed an obvious error by reversing appellant's convictions that were not implicated by the failure to provide a limiting instruction. We agree. At trial, appellant only requested a limiting instruction for the gun testimony as it related to the element of force in the rape count. The trial court's error in not providing such an instruction did not necessarily implicate his other convictions. *State v. Barney* (May 25, 2001), Seneca App. No. 13-2000-36 (error in jury instruction for one count required reversal of that conviction; other convictions affirmed). We therefore grant the State's application to reconsider and will address appellant's remaining assignments of error.

To the extent appellant claims in his second assignment of error that the trial court erred by not providing a limiting instruction for the gun testimony as it related to other counts, we agree in part. Appellant did not request a limiting instruction for the gun testimony for any count other than the rape count. Therefore, he waived any error in the trial court's failure to provide such an instruction absent plain error.

State v. Rawls, Franklin App. No. 03AP-41, 2004-Ohio-836, at ¶ 21; *State v. Riley*, Franklin App. No. 06AP-1091, 2007-Ohio-4409, at ¶ 4; *State v. Mitchell*, Cuyahoga App. No. 88977, 2007-Ohio-6190, at ¶ 84. " 'Plain error is an obvious error * * * that affects a substantial right.' " *State v. Yarbrough*, 95 Ohio St.2d 227, 2002-Ohio-2126, at ¶ 108, quoting *State v. Keith* (1997), 79 Ohio St.3d 514, 518. An alleged error constitutes plain error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different. *Yarbrough*, at 108. Notice of plain error is taken with the utmost caution only under exceptional circumstances and only where necessary to prevent a miscarriage of justice. *State v. Martin*, Franklin App. No. 02AP-33, 2002-Ohio-4769, at ¶ 28.

We first address appellant's kidnapping conviction. To convict appellant of kidnapping, the State had to prove beyond a reasonable doubt that appellant, by force, threat, or deception, removed the victim from a place or restrained her liberty to facilitate any felony or flight thereafter or to engage in sexual activity with the victim against her will. R.C. 2905.01.

Here, appellant forcibly pushed his way in through the front door and stood in between the victim and the front door, thereby blocking the victim's exit from the apartment. There was evidence that appellant was much taller and heavier than the victim. In light of this evidence, a reasonable jury could have concluded that even without the evidence of the gun, appellant, by force or threat, restrained the victim's liberty in order to

facilitate the commission of a felony or to engage in sexual activity with the victim. Therefore, we cannot say that the outcome of his kidnapping conviction clearly would have been different but for a limiting instruction as to the gun testimony. Cf. *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, at ¶ 24 (any error in admitting testimony not plain error where remaining evidence was sufficient for rational trier of fact to find defendant guilty).

We reach a different conclusion with respect to the conviction for aggravated burglary. To convict appellant of aggravated burglary in this case, the State had to prove beyond a reasonable doubt that appellant, by force, stealth, or deception, trespassed in an occupied structure when another person other than the appellant was present, with the purpose to commit any criminal offense, if the appellant inflicts, or attempts or threatens to inflict physical harm on the victim. R.C. 2911.11(A)(1).

The State contends that appellant committed this offense before he pulled out his gun by forcing his way into the apartment. Aggravated burglary does require a trespass by "force, stealth or deception." That element, however, is separate and distinct from the requirement that the State prove appellant inflicted, attempted, or threatened to inflict physical harm. At trial, the State argued that the subsequent rape satisfied the physical harm requirement. See, e.g., *State v. Shackelford* (Oct. 9, 1996), Summit App. No. C.A. No. 17690 (sexual assault inflicted physical harm for purposes of aggravated burglary). Because we have reversed appellant's rape

conviction, however, that offense cannot be used to establish the physical harm requirement for an aggravated robbery conviction.

If the jury could not consider the gun evidence for purposes of finding a threat of physical harm, there is no other evidence to establish that element of the offense. Forcible entry, by itself, is not a threat to inflict physical harm. No rationale trier of fact could have concluded beyond a reasonable doubt that appellant inflicted, attempted, or threatened to inflict physical harm based solely on a forced entry. Accordingly, the result of this conviction would clearly have been different had the trial court instructed the jury as to the proper consideration of the gun testimony.

The gun testimony does not have the same impact on his convictions for robbery, theft, receiving stolen property, failure to comply with an order of a police officer, and possession of cocaine. These counts were either admitted by appellant or committed days after the rape and kidnapping. The trial court did not commit plain error when it did not provide a limiting instruction for the gun testimony on these counts.

Appellant's second assignment of error is sustained in part and overruled in part. His convictions for rape and aggravated burglary are reversed and remanded for further proceedings. His convictions for kidnapping, robbery, theft, receiving stolen property, failure to comply with an order of a police officer, and possession of cocaine are affirmed.

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In appellant's third assignment of error, he contends that prosecutorial misconduct deprived him of a fair trial. Specifically, appellant claims the prosecutor elicited improper testimony and made improper arguments. We disagree.

The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14-15; *State v. Thompson*, 161 Ohio App.3d 334, 341, 2005-Ohio-2508, at ¶ 30. Generally, prosecutorial misconduct is not a basis for overturning a criminal conviction, unless, on the record as a whole, the misconduct can be said to have deprived the defendant of a fair trial. *State v. Lott* (1990), 51 Ohio St.3d 160, 166. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. *State v. Bey* (1999), 85 Ohio St.3d 487, 495.

Appellant first argues that the prosecutor elicited improper and irrelevant testimony describing how the police obtained a DNA sample from appellant. Specifically, the lead detective in this case was allowed to testify that appellant refused to provide a DNA sample and that "99 times out of 100" defendants comply with requests for DNA samples. The detective also testified about the steps taken to obtain the sample from appellant once they obtained a search warrant, including having the SWAT team restrain appellant. Appellant claims this testimony solely was offered to inflame the jury and to suggest he refused because he was guilty.

The State claims that the evidence was properly admitted to illustrate appellant's consciousness of guilt. We agree.

" 'It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.' " *State v. Williams* (1997), 79 Ohio St.3d 1, 11, quoting *State v. Eaton* (1969), 19 Ohio St.2d 145, 160. Although no Ohio case has specifically addressed whether or not the refusal to provide a DNA sample can be used as evidence of consciousness of guilt, courts in other states have held that the refusal to provide blood samples is admissible as evidence of consciousness of guilt. See *State v. Hernandez* (2003), 117 Wash.App. 1081; *People v. Roberts* (Cal.1992), 826 P.2d 274, 310-311.

Testimony that appellant refused to provide a DNA sample was admissible as evidence of consciousness of guilt. The refusal suggests that appellant was attempting to conceal his involvement in the crime. See *Williams; State v. Barton*, Warren App. No. CA2005-03-036, 2007-Ohio-1099, at ¶ 100 (accused's use of counter measures in an attempt to defeat a polygraph examination may indicate consciousness of guilt). The testimony describing the steps taken by the police to obtain the sample from appellant was relevant to show just how far appellant would go to conceal his involvement. *Columbus v. Dials*, Franklin App. No. 04AP-1099, 2005-Ohio-6305, at ¶ 46. Appellant attempted

to blunt the impact of his refusal to provide a DNA sample by offering another reason for his refusal. The State did not engage in improper conduct by asking the detective about appellant's refusal.

Appellant also contends that the prosecutor made improper statements during closing arguments. In general, prosecutors are given considerable latitude in opening statement and closing argument. *State v. Ballew* (1996), 76 Ohio St.3d 244, 255. In closing argument, a prosecutor may freely comment on " 'what the evidence has shown and what reasonable inferences may be drawn therefrom.' " *State v. Lott* (1990), 51 Ohio St.3d 160, 165, quoting *State v. Stephens* (1970), 24 Ohio St.2d 76, 82. Appellant did not object during the prosecutor's closing argument. The failure to object to alleged prosecutorial misconduct waives all but plain error. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, at ¶ 126; *State v. Loch*, Franklin App. No. 02AP-1065, 2003-Ohio-4701, at ¶ 43.

Appellant specifically points to the prosecutor's statements in closing argument that his resistance to police efforts to obtain a DNA sample could be considered as an indicia of guilt, and that appellant only came up with his version of events after he obtained results of the DNA test. We have already determined that the refusal to provide a DNA sample and the circumstances of that refusal could be used by the State to demonstrate appellant's consciousness of guilt. Therefore, the prosecutor could properly comment on that in closing argument. Second, the prosecutor's

comment about appellant's changing version of events was a fair inference from the evidence presented at trial. When interviewed by the police on September 2, 2002, appellant denied any knowledge of an incident with the victim. Later, at his first trial and again in this trial, appellant claimed that he previously met the victim and that they had consensual sex. It was fair for the prosecutor to infer, based on the evidence at trial, that appellant altered his version of events based on information he obtained after the September 2, 2002 interview. We find no plain error in regard to these comments.

Having found no prosecutorial misconduct, we overrule appellant's third assignment of error.

Appellant contends in his fifth assignment of error that the trial court's sexual predator classification was not supported by sufficient evidence. Because we have reversed appellant's rape conviction and remanded that count for a new trial, this assignment of error is moot. App.R. 12.

Appellant's sixth, seventh, and eighth assignments of error each contend that the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, is incompatible with the United States Supreme Court precedent in this area and that he is entitled to minimum, concurrent sentences on remand. This court has previously considered and rejected this very argument. *State v. Hudson*, Franklin App. No. 06AP-335, 2007-Ohio-3227, at ¶ 23. Appellant also claims that

the *Foster* court's severance remedy, as applied to his case, violates due process and ex post facto principles against retroactivity. This court has also consistently rejected this argument. *Id.* at ¶ 25. Appellant's sixth, seventh, and eighth assignments of error are overruled.

Finally, in his fourth assignment of error, appellant contends that he received ineffective assistance of counsel at his trial. We disagree.

In order to prevail on an ineffective assistance of counsel claim, appellant must meet the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, accord *State v. Bradley* (1989), 42 Ohio St.3d 136, *certiorari denied* (1990), 497 U.S. 1011, 110 S.Ct. 3258. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's deficient conduct by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Id.* at 690.

If appellant successfully proves that counsel's assistance was ineffective, the second prong of the *Strickland* test requires appellant to prove prejudice in order to prevail. *Id.* at 692. To meet that prong, appellant must show counsel's errors were so serious

as to deprive her of a fair trial, a trial whose result is reliable. *Id.* at 687. Appellant would meet this standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Appellant first claims that his trial counsel was ineffective for failing to object to the instances of prosecutorial misconduct alleged in his third assignment of error. We have already determined that the conduct complained of was not prosecutorial misconduct. Accordingly, counsel was not ineffective for failing to object to that conduct. *State v. Hairston* (June 11, 1999), Montgomery App. No. 17218.

Second, appellant contends that his trial counsel was ineffective for failing to prepare for or defend him at the sexual predator hearing. Our reversal of appellant's rape conviction renders this claim moot. App.R. 12(A).

Finally, appellant contends that his trial counsel was ineffective for failing to make objections based on assignments of error six and seven. We disagree. We have already rejected the arguments he presents in these assignments of error. The failure to raise nonmeritorius objections is not deficient performance, and additionally, appellant cannot show that he was prejudiced by counsel's failure to raise these issues.

Appellant did not receive ineffective assistance of counsel. Accordingly, his fourth assignment of error is overruled.

On reconsideration, we overrule appellant's first, third, fourth, sixth, seventh, and eighth assignments of error. His second assignment of error is overruled in part and sustained in part and his fifth assignment of error is rendered moot. Accordingly, the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part. Appellant's rape and aggravated burglary convictions are reversed and remanded for further proceedings. His other convictions are affirmed.

Application granted; judgment affirmed in part and reversed in part; and cause remanded.

BRYANT and SADLER, JJ., concurs.

APPENDIX B — OPINION OF THE COURT OF APPEALS OF OHIO FOR THE TENTH APPELLATE DISTRICT FILED FEBRUARY 12, 2008

IN THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

No. 06AP-644
(C.P.C. No. 02CR09-5493)

(REGULAR CALENDAR)

State of Ohio,

Plaintiff-Appellee,

v.

David E. Wade,

Defendant-Appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

Defendant-appellant, David E. Wade, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. For the following reasons, we reverse that judgment and remand the matter for further proceedings.

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On August 20, 2002, C.B. lived in an apartment near The Ohio State University campus. Around noon on that day, C.B. returned home from work to eat lunch. As she prepared her meal, she heard a knock on the door. A man on the other side of the door asked C.B. if he could use her phone. C.B. did not recognize the man. C.B. opened the door a little and handed the man a phone. She immediately closed and locked the door. When the man was finished using the phone, C.B. opened the door to retrieve it. The man then pushed his way through the door and into her apartment. He grabbed a gun out of his backpack and told her to take off her clothes. The man then raped her. C.B. later identified appellant as the man who raped her.

After the rape, appellant asked C.B. whether she had any money. She replied that she did not. Appellant then took C.B.'s purse, her laptop computer, and a phone. He then asked for her car keys, which she gave to him. Appellant left the apartment and drove away in C.B.'s car. The entire incident lasted about 20 to 30 minutes. C.B. went to a hospital, where a physical exam revealed redness on C.B.'s cervix and additional physical findings that were consistent with her version of events.

Two weeks later, appellant was driving C.B.'s car when he was involved in a police chase. The police ultimately arrested appellant, but not before he crashed the car and ran from the police. Appellant had a bag of cocaine in his possession when he was arrested.

As a result of these events, a Franklin County Grand Jury indicted appellant with one count of rape in violation of R.C. 2907.02, one count of aggravated burglary in violation of R.C. 2911.11, one count of kidnapping in violation of R.C. 2905.01, one count of aggravated robbery in violation of R.C. 2811.01, and two counts of theft in violation of R.C. 2913.02. Each of these counts also contained firearm specifications pursuant to R.C. 2941.141 and 2941.145, alleging that appellant had a firearm during the commission of each offense. Appellant was also charged with one count of receiving stolen property in violation of R.C. 2913.51, failure to comply with an order of a police officer in violation of R.C. 2921.331, and possession of cocaine in violation of R.C. 2925.11.

Appellant entered not guilty pleas to the charges and proceeded to a jury trial. C.B. testified that appellant forced his way into her apartment and raped her at gunpoint. She also testified that he took a number of items from her apartment, as well as her car. Although appellant admitted that he stole items from C.B.'s apartment and fled from the police, he denied that he raped C .B. and denied having a gun. He testified that he had consensual sex with C.B. The jury found appellant guilty of all counts except for the aggravated robbery count. The jury also acquitted appellant of all firearm specifications in the indictment. This court reversed those convictions based upon certain procedural deficiencies and remanded the matter to the trial court. *State v. Wade*, Franklin App. No. 03AP-774, 2004-Ohio-3974.

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On remand during the second jury trial, appellant sought to prohibit the State from admitting any testimony indicating that he possessed a gun during the commission of these offenses. He argued that allowing such testimony would be inconsistent with his acquittal for aggravated robbery in the first trial because the jury in the first trial determined that he did not possess a gun during the offenses. The trial court disagreed and permitted the State to introduce evidence that appellant used a gun to commit the offenses against C.B. During the second trial, C.B. again testified that appellant forced his way into her apartment and raped her at gunpoint. She also testified that appellant stole her car and a number of other items. Appellant again admitted that he stole items from C.B.'s apartment as well as her car. He also admitted that he fled from the police and that he possessed cocaine when he was arrested. Appellant again denied, however, that he raped C.B and that he had a gun. Instead, he claimed that he met C.B. months before at a festival and that they had consensual sex that day inside her apartment.

The jury rejected appellant's defense and found him guilty of all counts.[1] The trial court designated appellant a sexual predator and sentenced him accordingly. Appellant appeals and assigns the following errors:

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1. Because the first jury acquitted appellant of aggravated robbery and determined that he did not use a gun, appellant was not tried for aggravated burglary or any of the firearm specifications in his second trial.

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ASSIGNMENT OF ERROR NO. I:

COLLATERAL ESTOPPEL BARRED THE ADMISSION OF EVIDENCE ASSERTING THAT APPELLANT POSSESSED AND BRANDISHED A GUN. THE TRIAL COURT'S FAILURE TO EXCLUDE THIS EVIDENCE DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL, DUE PROCESS, AND THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS AS WELL AS ARTICLE I, § 2, 9, 10, & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. II:

THE ADMISSION OF THE GUN EVIDENCE AS OTHER ACTS EVIDENCE VIOLATED WADE'S RIGHT TO A FAIR TRIAL AND DUE PROCESS AND VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENT. IN ADDITION, THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY ON THE PROPER LIMITATIONS OF OTHER ACTS EVIDENCE THEREBY VIOLATING WADE'S RIGHTS TO A FAIR TRIAL.

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ASSIGNMENT OF ERROR NO. III:

THE PROSECUTOR HAS AN OBLIGATION TO SEEK JUSTICE AND TO REFRAIN FROM UNFAIRLY SEEKING A CONVICTION BASED ON IMPROPER EVIDENCE, IMPROPER ARGUMENT AND OTHER MISCONDUCT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, §§ 2, 9, 10, & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. IV:

THE REPRESENTATION PROVIDED TO DAVID WADE FELL FAR BELOW THE PREVAILING NORMS FOR COUNSEL IN A CRIMINAL CASE, WAS UNREASONABLE, AND AFFECTED THE OUTCOME IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS ART. I, § 2, 9, 10, & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. V:

THE ADJUDICATION THAT DEFENDANT-APPELLANT IS A SEXUAL PREDATOR IS NOT SUPPORTED BY THE COMMON PLEAS COURT'S FINDINGS AND IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

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ASSIGNMENT OF ERROR NO. VI:

A TRIAL COURT MAY NOT SENTENCE A DEFENDANT TO NON-MINIMUM AND CONSECUTIVE SENTENCES WITHOUT VIOLATING A DEFENDANT'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 10 AND 18 OF THE OHIO CONSTITUTION. THE DECISION RENDERED BY THE SUPREME COURT OF OHIO IN *STATE V. FOSTER* (2006), 109 OHIO ST.3D 1, IS INCOMPATIBLE WITH THE CONTROLLING PRECEDENT OF THE UNITED STATES SUPREME COURT AND MUST BE REJECTED.

ASSIGNMENT OF ERROR NO. VII:

THE TRIAL COURT VIOLATED WADE'S RIGHTS UNDER THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION BY SENTENCING APPELLANT TO A TERM OF INCARCERATION WHICH EXCEEDED THE MAXIMUM PENALTY AVAILABLE UNDER THE STATUTORY FRAMEWORK AT THE TIME OF THE OFFENSE. THE DECISION RENDERED BY THE

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SUPREME COURT OF OHIO IN *STATE V. FOSTER* (2006), 109 OHIO ST.3D 1, WHICH PURPORTS TO AUTHORIZE THE SENTENCE RENDERED AGAINST DAVID WADE, IS INCOMPATIBLE WITH THE CONTROLLING PRECEDENT OF THE UNITED STATES SUPREME COURT AND MUST BE REJECTED.

ASSIGNMENT OF ERROR NO. VIII:

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION BY SENTENCING APPELLANT PURSUANT TO THE DECISION RENDERED BY THE SUPREME COURT OF OHIO IN *STATE V. FOSTER* (2006), 109 OHIO ST.3D 1, BECAUSE THE HOLDING OF *FOSTER* IS INVALID UNDER *ROGERS V. TENNESSEE* (2001), 532 U.S. 451.

In his first and second assignments of error, appellant contends that the trial court erred by admitting testimony indicating that he used a gun during the commission of the rape when the jury in his first trial necessarily found that he did not possess a gun. Appellant also contends that the trial court erred by not giving a limiting instruction to the jury after the trial court admitted testimony that appellant raped C.B. at gunpoint.

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The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution incorporates the doctrine of collateral estoppel. *Ashe v. Swenson* (1970), 397 U.S. 436, 445-446, 90 S.Ct. 1189.[2] Simply put, collateral estoppel means that when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in any future lawsuit. *Id.* at 443; *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 442.

Collateral estoppel may affect successive prosecutions in one of two ways. *United States v. Brackett* (C.A.5, 1997), 113 F.3d 1396, 1398. First, it will completely bar a subsequent prosecution if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution. For example, in *Ashe,* a defendant charged with the robbery of six people at a poker party was found not guilty of one of the robberies. The only contested issue at trial was whether Ashe was one of the robbers. The jury concluded that he was not. The state subsequently tried Ashe for the robbery of another person at the poker party. The United States Supreme Court held that because the jury in the first trial necessarily found that Ashe was not one of the robbers, the state could not prosecute him again, because a second prosecution would require the relitigation of that issue. *Id.* at 446; see, also, *Columbus v. Rodriquez* (Nov. 7, 1996), Franklin

2. The Fifth Amendment's Double Jeopardy protections are enforceable against the States through the Fourteenth Amendment. *Ashe,* at 437.

App. No. 96APC05-601 (noting that collateral estoppel may bar second prosecution).

Secondly, collateral estoppel can also bar certain evidence in a subsequent trial. The doctrine prohibits the government from relitigating an issue of ultimate fact that was determined by a valid and final judgment. *Dowling v. United States* (1990), 493 U.S. 342, 347, 110 S.Ct. 668. This prohibition, however, does not exclude, in all circumstances, relevant and probative evidence otherwise admissible simply because it relates to alleged criminal conduct for which a defendant has been acquitted. *Id.* at 348.

Evidence of alleged criminal conduct for which a defendant has been acquitted may be admitted in a second trial where the ultimate issue of fact decided in defendant's favor in the first trial is not an ultimate issue of fact in the second trial. *Wright v. Whitley* (C.A.5, 1994), 11 F.3d 542, 546; *Brackett,* supra; *United States v. Bailin* (C.A.7, 1992), 977 F.2d 270, 280 (preclusion applied only where issue is ultimate issue in subsequent prosecution); *State v. Cotton* (La.2001), 778 So.2d 569, 576 (no preclusion where prior acquitted conduct not ultimate issue in second trial); *Eatherton v. State* (Wyo.1991), 810 P.2d 93, 100 (evidence of theft charge for which defendant was acquitted properly admitted in subsequent burglary trial where previous acquittal did not determine ultimate issue in burglary trial).

For example, in *Santamaria v. Horsley* (C.A.9, 1998), 133 F.3d 1242, the defendant was charged with murder

and robbery as well as a weapon enhancement which alleged that he used a knife in the commission of a felony. He was found guilty of murder and robbery but acquitted of the weapon enhancement. After an appeals court reversed those convictions, on remand the defendant sought to prohibit the prosecution from retrying him on the theory that he used a knife during the murder. The trial court agreed and prohibited the state from proceeding on that theory. After the California Supreme Court reversed, the United States Ninth District Court of Appeals, on a petition for a writ of habeas corpus, held in part that because the State was not required to prove beyond a reasonable doubt that the defendant used a knife in order to convict the defendant of murder in the second trial, the use of a knife was not an ultimate fact in the second trial. Thus, the state could present evidence that the defendant stabbed the victim. *Id.* at 1247.

Similarly, an issue may be relitigated in a second trial where the later action is governed by a lesser standard of proof. *Dowling.* For example, evidence of a prior bad act for which a defendant was acquitted may be introduced at a second trial under Evid.R. 404(B) to prove, among other things, identity. Such evidence is admissible because the State is not trying the defendant for the bad act in the second trial. *Id.* (evidence that defendant later committed home invasion, even though he was acquitted of the robbery, could be introduced at a later trial for earlier bank robbery to prove identity); *Charles v. Hickman* (C.A.9, 2000), 228 F.3d 981, 986 (testimony regarding previously acquitted charge of

murder properly admitted to prove motive in subsequent trial); *In re Burton*, 160 Ohio App.3d 750, 2005-Ohio-2210, at ¶ 14.

The case at bar does not involve the successive prosecution theory of collateral estoppel. At his second trial, appellant was not tried for aggravated robbery or any gun specifications. Here, the issue is whether or not collateral estoppel prohibited the admission of testimony in his second trial that appellant possessed a gun. We review the trial court's application of collateral estoppel de novo. *Charles*, at 985; *Bailin*, at 281 (de novo review of collateral estoppel decision) cf. *United States v. Dakota* (C.A.6, 2000), 197 F.3d 821, 826 (claims of double jeopardy reviewed de novo).

To determine whether collateral estoppel bars the admission of evidence that appellant used a gun during the commission of these offenses, we must first determine whether the jury in the first trial necessarily found that appellant did not possess a gun. Thus, we must examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters, and decide whether the jury could have reached its verdict without finding that appellant did not possess a gun. *Id.; Bailin*, at 280 (court must decide whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration). The defendant bears the burden to prove that the issue was necessarily resolved by the prior jury. *Dowling*, at 350.

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The State contends that the not guilty verdict in the first trial for the aggravated robbery count as well as the firearm specifications did not actually determine that appellant did not use a gun, because the jury could have acquitted appellant for other reasons. We disagree. The elements of aggravated robbery require that appellant attempt or commit a theft offense while possessing a deadly weapon. R.C. 2911.01. Appellant admitted to stealing C.B.'s car, computer, purse, and phone. Thus, the only conceivable reason for the jury's acquittal on this count was a finding that appellant did not possess a gun during the theft. Additionally, the jury asked during its deliberations whether appellant must have had a deadly weapon to find him guilty of aggravated robbery. The trial court replied in the affirmative. The jury then acquitted appellant of aggravated robbery and all of the firearm specifications. It is clear that the first jury actually decided that appellant did not possess a gun during the offenses and it is not conceivable that a rational jury could have grounded its verdict on any other issue.[3] *Ashe,* at 444.

Next, we must determine whether the issue necessarily decided in the first trial (that appellant did

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3. The State argues that the first jury may have acquitted appellant because the gun was not operable. We reject that claim based on the jury's own question as well as the fact that no evidence or argument was presented in the first trial on this issue. In order to determine what issue was actually litigated in the first trial, we do not apply the rule of collateral estoppel with a "hypertechnical and archaic approach" but with "realism and rationality." *Ashe,* at 444.

not have a gun) is an ultimate issue in the subsequent trial. To find appellant guilty of rape or kidnapping, the State had to prove beyond a reasonable doubt that appellant forcibly engaged in sexual conduct with C.B. and restrained her liberty using force. See R.C. 2907.02 and 2905.01. Force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). The definition of force does not require the use of a weapon. Therefore, the State could prove these offenses without proving that appellant used a gun.

Admittedly, testimony indicating appellant had a gun could be used to prove the force element of both rape and kidnapping. However, the jury's general verdict of guilty does not provide insight as to what facts the jury believed in this trial to find appellant guilty of rape and kidnapping. There are other ways to establish the element of force for these offenses. Here, there was evidence that C.B. was less than five feet tall and that appellant was six feet tall, weighed 170 pounds and that he forced his way into her apartment. We also note that although the first jury determined that appellant did not have a gun, it nevertheless found appellant guilty of rape and kidnapping, thereby finding the element of force beyond a reasonable doubt even without a gun. Thus, the State was not precluded from admitting evidence that appellant possessed a gun during the

offenses, provided that the testimony was otherwise admissible. *Dowling,* at 348.[4]

We further find that the testimony that appellant possessed a gun during these offenses was admissible. Evidence of appellant's actions during the offenses is admissible if the evidence is "inextricably related" to the crime charged and plays a role in explaining the sequence of events and gives a complete picture of the alleged crime. *State v. Thompson* (1981), 66 Ohio St.2d 496, 498; *State v. Henry,* Franklin App. No. 05AP-1075, 2006-Ohio-4783, at ¶ 27. Testimony that appellant possessed a gun during the offenses is inextricably related to the charges and provides a complete picture of the sequence of events. See *State v. Jackson,* Franklin App. No. 02AP-867, 2003-Ohio-6183, at ¶ 31. The jury was entitled to a complete picture of the alleged crimes. The trial court did not err by admitting testimony indicating that appellant possessed a gun during these offenses.[5]

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4. Appellant's reliance on *Rice v. Marshall* (C.A.6, 1987), 816 F.2d 1126 is misplaced. First, we note that the case dealt with an ineffective assistance of counsel claim. Secondly, although the court did note, relying on *Ashe,* supra, that a previous acquittal of a weapon charge constituted a finding that he did not have a gun and precluded the introduction of contrary evidence at a subsequent trial, that case was decided before *Dowling* clarified the scope of the *Ashe* holding.

5. We do not agree with the trial court that evidence that appellant used a gun during these offenses was properly

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Finally, appellant contends that the trial court erred by not giving the jury a limiting instruction regarding the gun testimony. Appellant did not request that the trial court instruct the jury that he had previously been acquitted of possessing a gun during the commission of the offenses. Instead, he requested that the trial court instruct the jury that it could not consider the gun testimony to determine whether he used force in the rape. The trial court denied appellant's request. It is well-established that a trial court has broad discretion in instructing the jury. *State v. Simpson*, Franklin App. No. 01AP-757, 2002-Ohio-3717, at ¶ 84, citing *State v. Smith* (Apr. 2, 2002), Franklin App. No. 01AP-848.

Collateral estoppel did not bar the admission of testimony indicating appellant had a gun during the commission of the offenses. Further, that testimony was admissible to provide the jury a full and complete picture of the sequence of events the victim described. However, the State did not present the testimony simply to provide the jury with a complete picture of the events. During the State's questioning of C.B., the prosecutor referred to appellant's possession of a gun during the rape a number of times, implying that appellant used the gun to commit the rape. In closing arguments, the prosecutor referred to the rape charge and reminded

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admitted as "other acts" evidence under Evid.R. 404(B) because the evidence was not admitted to prove any of the permissible purposes under that rule. Nevertheless, for the reasons discussed, the evidence was admissible on other grounds.

the jury that "the Defendant had a weapon while committing that offense." It is clear that the State used the gun testimony to prove that appellant used force to commit the rape.[6]

Although collateral estoppel did not prohibit the admission of testimony indicating that appellant possessed a gun, the principle underlying that doctrine requires a limiting instruction such as the one appellant requested. Cf. *Rossetti v. Curran* (D.Mass.1995), 891 F.Supp 36, 47 (noting concerns underlying doctrine). The principle is that one who has been acquitted of a crime should not be forced to "run the gauntlet" a second time. *Ashe,* at 446. Cf. *Rossetti,* quoting *Dowling* ("If there ever was the likelihood that such evidence would create the 'constitutionally unacceptable risk that the jury will convict . . . on the basis of inferences drawn from the acquitted conduct,' it is this case."). The danger of this occurring in this case was high.

Absent a limiting instruction, there was a significant danger that the jury in the second trial would find the element of force for rape based upon evidence that the appellant had a gun, even though the jury in the first trial necessarily found that appellant did not possess a gun during the offenses. Appellant's requested limiting instruction would have allowed C.B. to describe her version of the events but would have prevented the jury

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6. The prosecutor also told the jury, in regards to the kidnapping charge, that C.B. would have left the apartment but for the fact that appellant had a gun.

from using the evidence that appellant had a gun to find the element of force for a rape conviction. The trial court abused its discretion by not instructing the jury that it could not consider the gun testimony in determining whether appellant used force while committing the rape offense.[7]

Appellant's first assignment of error is overruled. However, because the trial court erred by not providing the limiting instruction requested by appellant, we sustain in part appellant's second assignment of error. Our resolution of appellant's second assignment of error renders appellant's remaining assignments of error moot. App.R. 12(A). This matter is remanded to the Franklin County Court of Common Pleas for further proceedings consistent with law and this opinion.

Judgment reversed and cause remanded.

BRYANT and SADLER, JJ., concur.

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7. Although we have previously referred to evidence other than the gun testimony that could support a finding of force in this case, that evidence was minimal. There is a substantial likelihood that the jury considered appellant's alleged use of a gun in finding the element of force. Thus, we cannot say that the trial court's error was harmless. See *State v. Ganelli*, Cuyahoga App. No. 84694, 2005-Ohio-770, at ¶ 28.

APPENDIX C — ENTRY DENYING REVIEW OF THE SUPREME COURT OF OHIO FILED AUGUST 6, 2008 (Case No. 2008-0604)

THE SUPREME COURT OF OHIO

Case No. 2008-0604

ENTRY

State of Ohio

v.

David E. Wade

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

Upon consideration of appellant's motion to consolidate this case with Supreme Court Case No. 2008-0941,

It is ordered by the Court that the motion is denied as moot.

(Franklin County Court of Appeals; No. 06AP644)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX D — ENTRY DENYING REVIEW OF THE SUPREME COURT OF OHIO FILED AUGUST 6, 2008 (Case No. 2008-0941)

THE SUPREME COURT OF OHIO

Case No. 2008-0941

ENTRY

State of Ohio

v.

David E. Wade

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and leave to cross-appeal and dismisses the appeal and the cross-appeal as not involving any substantial constitutional question.

Upon consideration of appellant/cross-appellee's motion to consolidate this case with Supreme Court Case No. 2008-0604,

It is ordered by the Court that the motion is denied as moot.

(Franklin County Court of Appeals; No. 06AP644)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice